Petition

No. 81-1406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN I. GREENE,

Petitioner,

—v.—

IN THE MATTER OF ALAN I. GREENE, AN ATTORNEY (ADMITTED TO PRACTICE AS ALAN IRA GREENE). THE GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Dated: January 26, 1982

QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistently with the First Amendment, a state may discipline an attorney for mailing to real estate brokers in his vicinity a truthful and non-misleading announcement of his availability to handle real estate matters for their clients.

2. Whether, consistently with the Due Process Clause of the Fourteenth Amendment, a state may discipline an attorney for violating a state statute which purports to ban all lawyer advertising which can be "constitutionally proscribed," and which therefore provides no actual notice of what conduct is proscribed.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Alan I. Greene respectfully petitions for a writ of certiorari to review the

judgment in this case of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. B 3-51) is not yet reported. The opinion of the Appellate Division (Pet. App. F66-71) is reported at 78 A.D.2d 131, 433 N.Y.S.2d 853. The Referee's Report (Pet. App. D56-61) has not yet been published.

JURISDICTION

The judgment of the New York Court of Appeals (Pet. App. A1-2) was entered on October 29, 1981. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(3).

STATUTES INVOLVED

New York State Judiciary Law §479 provides:

> It shall be unlawful for any

> person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

STATEMENT OF THE CASE

The facts of this case are undisputed. Alan Greene has been a practicing lawyer in New York State since 1960. In August and October, 1978, he mailed approximately 1,000 fliers to real estate brokers in Westchester and Putnam Counties, where he does the bulk of his work, advising them of his availability to handle real estate matters for their clients. The fliers were truthful, informative and not misleading in any fashion. In accordance with the guide-

lines for lawyer advertising set forth in New York's Code of Professional Responsibility,[1] the fliers indicated Greene's basic fee schedule and legal experience. In closing, they noted: "By recommending the services of ALAN I. GREENE, you, the realtor, will save your client time and money -- one of the main reasons they called on you."[2]

Based solely on this flier, Greene was charged and subsequently found guilty

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1. See DR 2-101.

2. A photostat of Greene's flier is reprinted in the appendix at Pet. App. C 52-55.

of professional misconduct for violating §479 of the New York State Judiciary Law, a pre-Bates statute broadly barring solicitation in any form. As the Court of Appeals recognized, that finding represents a "professional stigma," Pet. App. B10, even though Greene was not otherwise subject to any formal sanction.

Only one year prior to its decision in this case, the New York Court of Appeals had unanimously held that "[d]irect mail solicitation of clients by lawyers is constitutionally protected speech which may be regulated but not proscribed." Koffler v. Joint Bar Association, 51 N.Y.2d 140, 143, 432 N.Y.S.2d 872, 875, cert. denied, ___ U.S. ___, 68 L.Ed.2d 221 (1981). In distinguishing Koffler, the majority below emphasized what it perceived as the special dangers inherent in

"third person mailings." Specifically, it asserted that a lawyer who receives a referral from a real estate broker might have divided allegiance between the client and the broker on whom the lawyer is depending for future referrals. Thus, for example, the lawyer might be disinclined to bargain on behalf of the client over the broker's commission.

The dissent responded to these concerns by noting that the dangers identified by the majority existed in any referral system, did not depend upon the fact that the referral was based on a flier rather than social contacts, and could be dealt with by less restrictive means. In short, the dissent dismissed the majority opinion as "no more than direful speculation which . . . reflects perhaps unconscious, but nevertheless impermissible, obeisance to

the tastes and traditions of the pre-Bates yesteryear." Pet. App. B37.

REASONS FOR GRANTING THE WRIT

This case raises an unanswered question on the scope of lawyer advertising which is extremely important to the public and the bar. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), this Court struck down a general proscription against lawyer advertising on the ground that "such speech serves individual and societal interests in assuring informed and rational decisionmaking." 433 U.S. at 364. In Ohralik v. Ohio Bar Association, 436 U.S. 447, 449 (1978), the Court reaffirmed Bates, but held that Bates had not withdrawn the state's right to "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers

that the State has a right to prevent." This case involves conduct falling between Bates and Ohralik.

It is not, however, a mere academic exercise in legal analogy. Most people in this country who require a lawyer must seek the advice of others. As this Court recognized in Bates, the era of "small town society" when "reputational information" was common knowledge has long since passed. 433 U.S. at 374-75 n. 30. Not surprisingly, these "changed conditions" have been clearly perceived by the legal profession and reflected in its Code of Professional Responsibility. Because "the reputations of lawyers are not sufficiently known to enable potential users of legal services to make intelligent choices,"[3] the Code now affirmatively

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3. New York State Code of Professional Responsibility, EC 2-7.

encourages those needing a lawyer to gather the "[d]isinterested and informed advice and recommendation of third parties -- relatives, friends, acquaintances, business associates, or other lawyers . . . "[4]

The decision in this case effectively cripples that salutary process. The most cost effective way for a lawyer to make his or her services known with a community is often to make the sort of targeted mailing which Alan Greene used here. In the end, it is the public which profits as much as the lawyer from the dissemination of information. Virginia State Board of Pharmacy v. Virginia Citizens Consumer

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4. New York State Code of Professional Responsibility, EC 2-7.

Council, Inc., 425 U.S. 748 (1976). Moreover, prohibiting all third-party mailings will not eliminate the risks associated with a referral system; it will merely restrict the opportunities made available through referrals to a limited group of well-connected lawyers.

Other states which have reviewed the propriety of third-party mailings in the wake of Bates have differed with the conclusion reached by New York. This conflict among the states is especially inappropriate in a First Amendment context and can only be resolved by a decision from this Court.

In addition, this Court has already heard argument this term on another lawyer advertising case. In the Matter of RMJ, No. 80-1431. The outcome there may be dispositive here; if not, it is almost

certainly bound to be relevant. If the petition for certiorari is not speedily granted, consideration of it should at very least be deferred until a decision is rendered in RMJ so that this Court can then decide whether to summarily reverse, or remand for further proceedings.

In addition, this case presents an important procedural issue of constitutional significance totally distinct from the substantive question of whether New York can prohibit all third-party mailings by lawyers. Alan Greene was disciplined for violating a section of New York State's Judiciary Law which was written ten years before Bates and has not been amended since. On its face, it purports to ban all lawyer advertising in clear violation of Bates. Until this case, there was no way of knowing that this facially

invalid statute would be construed to forbid third-party mailings, particularly since that practice is nowhere mentioned in the law itself. Moreover, the limiting construction imposed by the Court of Appeals is itself perfectly vague, since it depends wholly on as-yet-unwritten decisions of this Court. As a result, Alan Greene was disciplined for violating a statute with absolutely no notice that it applied to his conduct. Under these circumstances, his punishment is unconstitutional and a denial of due process.

I. THE DECISION BELOW CREATES A CONFLICT WITH THE DECISIONS IN OTHER STATES

The decision below is directly in conflict with decisions on the same subject issued by at least two other state courts of last resort. In Matter of

State Bar Grievance Administrator v. Jaques, 407 Mich. 26 (1979), the Michigan Supreme Court upheld the right of a lawyer to solicit tort claims through a union agent. In Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978), the Kentucky Supreme Court upheld the right of a lawyer to do precisely what Greene had done here -- send a letter to a real estate broker soliciting business.

Both these opinions were cited by the majority below which expressly "decline[d] to follow them," Pet. App. B26-27, n. 4.

It is not only courts of last resort which are in conflict with the decision below, but at least two other states, through their formal rule making apparatuses, are in conflict. The Grievance Commission of the Board of Overseers of the Maine Bar has issued an

opinion (Pet. App. G72-83) that the solicitation rule of that state is not violated by letters mailed to relatives of an accident victim seeking to represent the victim, provided only that such letters are not sent with the intention that they should arrive in the hands of the victim personally while the victim is still in the hospital. Oregon Legal Ethics Opinion Number 431, Guideline Number 15 (Pet. App. H84-85), expressly following Kentucky Bar Association v. Stuart, supra, approves the sending of third-party letters as a permissible form of advertising and specifically uses the example of letters to real estate brokers.

The authority to discipline lawyers and set rules for practice is, of course, a matter of state prerogative. But the discretion of the state is subject to

constitutional constraints. Only this Court can resolve the dispute which has now arisen among the states on the question of whether the use of third-party mailings by lawyers is entitled to constitutional protection.

II. THE DECISION BELOW REPRESENTS AN UNCONSTITUTIONAL ABRIDGEMENT OF FREE SPEECH AND IS INCONSISTENT WITH THE PRINCIPLES GOVERNING LAWYER ADVERTISING WHICH THIS COURT HAS PREVIOUSLY ENUNCIATED

Following this Court's decision in Bates, there can no longer be any serious claim that lawyer advertising is beyond constitutional protection as a species of expression. Notwithstanding its commercial aspect, this Court has recognized that lawyer advertising plays a vital role in informing a public which is increasingly dependent on legal services.

Nor is there any dispute about the standard to be applied in judging the constitutionality of New York's total ban on third-party mailings. In Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), this Court developed a four-part analysis for use in the commercial speech context.

The first two prongs of that test present no problem here. There has never been any claim that Greene's simple flier was in any way misleading and the state's interest in maintaining the quality of legal services is both obvious and substantial. Rather, the issue has been from the beginning whether New York's total ban on third-party mailings "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S.

at 566.

In sustaining the ban, the Court below primarily relied on two grounds. First, it found this case governed by Ohralik since Greene's flier relied on further communication between the broker and the client which the Court below felt raised the possibility of importuning. Second, the majority argued that the use of third-party mailings created a potential for conflicts of interest which could be addressed through a prophylactic rule. Neither justification withstands scrutiny.

Even accepting that Greene's flier presumed further contact between broker and client, and even assuming that contact would take the form of personal conversation, it poses none of the dangers which troubled this Court in Ohralik. Most importantly, the broker's financial self-

interest is not affected by whether his or her advice about a lawyer is accepted by the client. Thus, there is no reason to believe that the broker will pressure his or her client into a "speedy and perhaps uninformed decision[]" based on "a one-sided presentation." 436 U.S. at 457. To the contrary, the broker's self-interest is advanced by maintaining the confidence and trust of his or her client. In any event, lawyers should not generally be penalized nor the public denied important information because some real estate brokers may act irresponsibly.

The concern about potential conflicts of interest relates more directly to the lawyer but is no more well-focused. According to the majority below, a lawyer who accepts referrals from a real estate broker may be less inclined to antagonize

the broker by questioning the marketability of title or disputing the broker's fee. Pet. App. B26-28. However that may be, the ban on all third-party mailings is grossly both underinclusive and overinclusive. It is underinclusive because a potential conflict of interest is just as likely to arise if the referral is based on a social contact instead of a mailing, but third-party referrals have never been forbidden for that reason. And it is overinclusive for reasons pointed out by this Court in Bates:

> We suspect that, with advertising, most lawyers will behave as they always have. They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in

> weeding out those few who abuse their trust. 433 U.S. at 379.

When regulating First Amendment speech, a closer fit is required between means and ends. Speiser v. Randall, 357 U.S. 513, 525 (1958). Moreover, "[r]estraints on advertising are an ineffective way of deterring shoddy work," Bates v. State Bar of Arizona, 433 U.S. at 378, especially in light of the close regulation to which attorneys are subject. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 768.

Finally, less restrictive alternatives exist to satisfy the concerns expressed by the majority below. The state already has the authority to discipline lawyers for conflicts of interest. Or, if the state was seeking a prophylactic measure, it could have imposed a filing requirement to

monitor third-party mailings or insisted on an appropriate disclaimer. Either alternative would have impinged less directly on constitutionally protected speech. The latter alternative has been endorsed by the Kentucky Supreme Court in similar circumstances. Kentucky Bar Association v. Stuart, 568 S.W.2d at 934.

III. THE DECISION BELOW OFFENDED DUE PROCESS BY UPHOLDING A DISCIPLINARY SANCTION BASED ON A STATE STATUTE WHICH PROVIDES NO NOTICE OF WHAT CONDUCT IS PROSCRIBED

Alan Greene was disciplined by the New York State courts for violating a section of the Judiciary Law which bans all lawyer advertising.[5] The statute was

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5. By its terms, Section 479 of New York State Judiciary Law simply bars an attorney from soliciting business. See p. 2-3, supra. The New York Court of Appeals, since its decision in Koffler, has considered all advertising as a form of solicitation, but by this decision holds that

enacted in 1967, a decade before Bates, and has not been amended. Acknowledging its facial invalidity following Bates, the majority below nonetheless held "the section remains effective except as constitutionally proscribed." (Pet. App. B14). Unfortunately, until this case there was no way of knowing whether third-party mailings would fall within some constitutional residuum of the law which had not yet been defined. A state may not, consistent with due process, punish or proscribe all conduct "not constitutionally protected" without more closely specifying it.

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advertising by mail to brokers is a proscribed subdivision of solicitation.

Since the subject of third-party mailings is not even mentioned in section 479, the interpretive efforts of the Court below are vastly different from the process of severing an unconstitutional portion of an otherwise valid and specific enactment. The majority admitted, in a classic understatement, that "amendment of the section might clarify the intention of the Legislature . . . ."(Pet. App. B13). Indeed, without an amendment, the intent of the legislature is entirely obscure. The Court of Appeals' attempt to limit section 479 by the as yet unwritten progeny of Bates turned that section into a vague and imponderable statute which gives wholly insufficient guidance as to what conduct it

proscribes.[6]

Fifty years ago, this Court condemned "exaction of obedience to a standard that is so vague and indefinite as to be really no standard at all." Champlin Refining Co. v. Corp. Commission of Oklahoma, 286 U.S. 210, 243 (1932). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that

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6. The majority below ambiguously refers to the judiciary's coordinate power to regulate the conduct of lawyers. (Pet. App. B13-14). In this case, however, the only regulatory source relied on by the Court was section 479.

he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Accordingly, "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

Section 479, which expressly forbids conduct which may not be proscribed under Bates, and which as construed may or may not proscribe conduct depending only on the future reach of Bates' progeny, fails this basic test. It cannot, consistent with fundamental fairness, be constructed by the courts on a case-by-case basis. At the very least, any new interpretation of the statute should be applied only

prospectively and not to someone like Greene who could not have anticipated it in advance.

IV. A DECISION NOW PENDING IN THIS COURT MAY HAVE A DIRECT RELEVANCE TO THE ISSUES DESCRIBED HERE

Earlier this term, this Court heard oral argument in Matter of RMJ, No. 80-1431, another lawyer advertising case. One of the questions presented to the Court in RMJ was:

> Whether, consistent with the First and Fourteenth Amendments, a state supreme court may discipline a lawyer for mailing a simple announcement of the opening of his office to persons with whom he is not acquainted, on the basis of a court rule limiting the mailing of announcements to "lawyers, clients, former clients, personal friends and relatives."

Depending upon the answer to that question, it may be appropriate summarily

to reverse the decision below or, alternatively, to remand for further proceedings. A writ of certiorari should therefore issue to ensure that this case is ultimately resolved in conformity with the decision in RMJ.

CONCLUSION

For the reasons stated herein, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Appendix

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Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Dated: January 26, 1982

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APPENDIX A

Remittitur

Court of Appeals

State of New York

The Hon. Lawrence H. Cooke,
Chief Judge, Presiding

2 No. 422
In the Matter of Alan I. Greene,
an Attorney (admitted to practice
as Alan Ira Green).
The Grievance Committee for the
Ninth Judicial District,
Respondent.

v.

Alan I. Greene,
Appellant.

The appellant in the above entitled appeal appeared by Jeremiah S. Gutman, Esq. The respondent appeared by Richard Grayson, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, without costs. Opinion by Meyer, J. All concur except Fuchsberg, J., who dissents and votes to reverse in

an opinion in which Cooke, Ch.J, concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Second Department.
there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw
Deputy Clerk of the Court
October 29, 1981

Court of Appeals, Clerk's Office, Albany,

APPENDIX B

State of New York

Court of Appeals

2 No. 422
In the Matter of Alan I. Greene,
an Attorney (admitted to OPINION
practice as Alan Ira Green.)
The Grievance Committee for the
Ninth Judicial District,
Respondent,
v.
Alan I. Greene,
Appellant.

(422)Jeremiah S. Gutman, NY City, for appellant. Richard E. Grayson & Donald E. Humphrey, White Plains, for respondent.

MEYER, J.

To the extent that Judiciary Law, Section 479, and DR2-103(A) of the Code of Professional Responsibility proscribe advertising of attorneys' services by direct mail addressed to real estate brokers, those provisions regulate the manner rather than the content of commercial speech and, the regulations being reasonable and the State having a sub-

stantial interest in the protection of clients against potential conflict of interest, are constitutional regulations of such speech. Thus, we answer so much of the question left open in Matter of Koffler (51 NY2d 140, 145, cert den 68 L Ed 2d 221) concerning third-person mailings as relates to mailings addressed to real estate brokers by holding regulations proscribing such mailings constitutional. The order of the Appellate Division should, therefore, be affirmed, without costs.

Respondent Greene was admitted to the practice of law in New York in 1960. He admitted in his answer to the disciplinary proceeding brought against him by the Grievance Committee for the Ninth Judicial District that "in or about August, 1978 and October, 1978, Respondent caused to be prepared and

caused to be mailed approximately one thousand direct mail fliers to real estate brokers in Westchester County and portions of Putnam County" and concedes in his brief before us that he was "hoping by his mailings to move the recipients to remember his availability should the occasion arise when a buyer or seller sought a reference to an attorney in a real estate transaction." The flier read in pertinent part:

> "ALAN I. GREENE offers your client full legal representation on any and all property transactions for just $335. Legal coverage begins with contract and continues through to closing. With 18 years experience, the office of ALAN I. GREENE is fully prepared to expedite all closings and offer competent advice to the buyer and/or **seller**. Your real estate office will be afforded our full cooperation. With just two hours notice, a contract and all legal documents can be prepared.
>
> By recommending the services of ALAN I. GREENE, you, the realtor,

> will save your client time and money -- one of the main reasons they called on you!"

Testifying before the Referee, respondent stated that he got no business from the brokers to whom the flier was sent, indeed, that he had gotten a negative response from them.

The Referee, treating the issue as one of law to be decided on the basis of the undisputed facts, found respondent in violation of Judiciary Law, Section 479, and DR2-103(A) of the Code of Professional Responsibility, but noted in his report that the fliers had been sent prior to the Appellate Division's decision in Matter of Koffler (70 AD2d 252) and were mailed in reliance on Bates v State Bar of Arizona (433 US 450), and that in Koffler the Appellate Division had imposed no sanction.

Petitioner moved for confirmation of the Referee's report and the disciplining of respondent. Respondent likewise moved "for an order confirming and adopting the report" but asked that he, as had been the attorneys in Koffler, be exonerated. The Appellate Division, noting our reversal in Koffler and reservation of the third-party mailing question, found that the fliers "directly solicited the real estate brokers to refer individuals to the respondent to use the respondent's legal services in connection with the sale or purchase of real property" as alleged in the petition, and held such a mailing proscribed and not constitutionally protected, but imposed no sanction. The appeal is before us on constitutional grounds (CPLR 5601, subd [b], par [1]).

As we noted in Koffler (51 NY2d at p 143, n 1), the absence of sanction does not affect respondent's right of appeal from the confirmed finding of a violation. Petitioner argues, however, that the appeal should be dismissed as moot because respondent was on April 9, 1981 suspended from the practice of law, on the basis of incapacity, and for lack of aggrievement in view of respondent's motion to confirm. Respondent suggests that the record is not appropriate for decision, that the state interest sought to be protected is not sufficiently defined, and that his mailing is not in-person solicitation such as was condemned by the Supreme Court in Ohralick v Ohio State Bar Assn. (436 US 447). In an amici brief filed on behalf of four attorneys against whom similar charges are pending

in the Third Department, it is argued that what is regulated in this instance is not manner of distribution but content. We affirm, though upon somewhat different reasoning than that of the Appellate Division.

I

The arguments for dismissal require little comment. For the same reason that the absence of sanction does not foreclose appeal from the finding of violation, it cannot be said that respondent was not aggrieved by the Appellate Division's order. Though his motion paper could have been more carefully worded, it clearly asked for "exoneration", which is inconsistent with the legal conclusion suggested by the Referee. The reference was to hear and report and the facts being undisputed, we construe the motion

paper to have requested confirmation of the factual conclusions of the Referee, but not of his conclusion of law.

Nor does respondent's suspension for incapacity after the Appellate Division decision moot the question, for that suspension, though indefinite in time, was made because of respondent's inability to participate in a formal disciplinary hearing. Though no sanction has been imposed in the instant proceeding, the finding of violation is a professional stigma that may be considered in determining the discipline to be imposed after formal hearing on the new charges should respondent recover from his incapacity and the result of such a hearing be against him. Even if that were not so, the pendency of four other similar proceedings against amici suggests that the controversy is of a recurring character and

should be considered by us rather than dismissed for mootness.

II

The proscriptions, the constitutionality of which is in issue, are found in Section 479 of the Judiciary Law and Section DR2-103(A) of the Code of Professional Responsibility. The former reads:

> "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreement"

The latter, as amended on April 29, 1978, provides:

> "A lawyer shall not solicit employment as a private

practitioner of himself or herself, a partner or an associate to [sic][1] a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision."[2]

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1. As originally adopted by the New York State Bar Association, DR2-103(A) used the word "recommend" rather than "solicit" in its first line. Moreover, it did not include the present second sentence or the last eight words of the first sentence.

2. The petition refers also to the Rules of the Appellate Division without specific reference to any rule. Rule 691.22 (22 NYCRR 691.22) deals with "Advertising and publicity by attorneys", but is not considered further because not referred to by either court below and not otherwise germane to the discussions which follows. DR2-101, referred to in DR2-103(A), is, except for the substitution of "lawyer" for "attorney", identical with Rule 691.22.

DR2-104 (subd c) permits a lawyer to "accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services", but the section is not otherwise germane.

The effect of our Koffler decision and of the Supreme Court decisions referred to in that opinion and in this is to leave the rule declared by the Legislature in Judiciary Law, Section 479 free to operate in areas not affecting constitutionally free speech (Belli v State Bar of California, 10 Cal 3d 824, app for stay den 416 US 965). Though amendment of the section might clarify the intention of the Legislature as a source, coordinately with the judiciary,

of the public policy governing the conduct of lawyers, the absence of such amendment leaves no vacuum. The section remains effective except as constitutionally proscribed.

The Code of Professional Responsibility is, however, an enactment of the New York State Bar Association rather than the Legislature or any court. Its provisions have been incorporated by reference in the rule defining professional misconduct (22 NYCRR §§ 603.2, 691.2, 806.2, 1022.17) adopted by each of the Appellate Divisions pursuant to statute (former Section 216 of the Judiciary Law) and continued in effect by Section 13 of chapter 156 of the Laws of 1978. The specific provisions of the Code dealing with advertising have also been adopted as a rule by each of the

Appellate Divisions, with the minor change referred to in footnote 2 above (22 NYCRR §§ 603.22, 691.22, 806.15, 1022.16). But the Code cannot, either directly or through incorporation in a court rule, amend or limit a statute adopted by the Legislature (People v La Carruba, 46 NY2d 658, 663; see Matter of Weinstock, 40 NY2d 1, 6). Thus, even if DR2-104 were broad enough in language to be deemed to authorize third-party direct mail generally (which, in our view, it is not), it would not limit the effect of Judiciary Law, Section 479 as a bar to such advertising. In light of that fact and of the limiting phrase ("in violation of any statute or court rule") in the first sentence of DR2-103(A), the questions before us are, therefore, reduced to whether as a matter of statutory construction Judiciary Law,

Section 479 proscribes third-party mailings and, if so, whether such a proscription is constitutionally permissible.

The statutory construction question is answered, in essence, by our holding in Koffler that"[n]ot all solicitation is advertising, though all advertising either implicitly or explicitly involves solicitation" and by the words "directly or indirectly" contained in Section 479. Direct mail advertising addressed to real estate brokers is, as respondent conceded and the Appellate Division found, direct solicitation of the brokers to refer clients to respondent, and, thus indirect solicitation of clients by respondent.

III

Because overbreadth analysis does not apply to commercial speech (People v Mobil Oil Corp., 48 NY2d 192, 199) and because laws regulating the time, place or manner of speech stand on a different footing from laws restricting speech because of its subject matter or content (Linmark Associates v Willingboro, 431 US 85, 93; Police Department of Chicago v Mosley, 408 US 92, 95), we turn first to consideration of respondent's flier.

Our conclusion is that it is the manner rather than the content of the speech in issue which brings it into conflict with the statute. While its last paragraph specifically asks that respondent be recommended to clients of the brokers receiving the flier, the necessary implication of the transmittal to the brokers of the information contained in the first quoted paragraph is

that respondent seeks by sending the flier to the broker to have clients of the broker referred to him for legal work. This is conceded by respondent's brief and would, in any event, necessarily follow from the fact that a real estate broker is one "who, for another and for a fee * * * sells * * * exchanges, buys or rents * * * an estate or interest in real estate" (Real Property Law, §§440; see Executive Law, §292, subd [14]). In short, were the fourth sentence of the first quoted paragraph and the last paragraph of the flier omitted, the statute would proscribe it nevertheless. It is, thus, the manner of advertising the service to respondent's potential clients rather than the fact that the flier explicitly asks for recommendations that runs it afoul of the statute (see Eaton

v Supreme Court of Arkansas, 607 SW2d 55 [Ark], cert den 101 Sup Ct 148).

Nor can it be said, as was held in Linmark, supra, that though as applied to respondent it restricts but one method of communication, the restriction is nonetheless related to content. Linmark's conclusion was based upon the ineffectiveness of alternatives to a "For Sale" sign, the absence of a prohibition of lawn signs bearing other messages, and the lack of a detrimental secondary effect on society. Here, respondent concedes that his letter to brokers, like the newspaper advertisement in Koffler, was ineffective,[3] whereas

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3. The brief of amici states that their experience was the same.

direct mail to clients, permitted under Koffler and shown in that case to be productive, is the more fruitful opinion. Here also, though under familiar principles of jurisprudence we limit our ruling to third-party mailings to brokers, the statutory language prohibits all third-party mailings, not just mailings to brokers. Finally, there is, as hereafter demonstrated, a detriment to society in the potential conflict of interest that may be generated when those in need of legal services are approached indirectly through a broker. The restriction imposed upon respondent neither is, nor should it be construed to be, one upon content. And as a regulation of the manner of speech, control of which in light of the governmental interest to be served, the lack of effectiveness of the

medium and the more effective available alternatives, must be deemed reasonable, the statute as applied to respondent is constitutional (Matter of Koffler, supra, at p 150; Consolidated Edison v Public Serv. Comm., 447 US 530, 535-536; Virginia Pharmacy Bd. v Virginia Consumer Council, 425 US 748, 771).

But if we were to construe the statute as addressed to content, our conclusion would be no different. As we noted in Koffler (51 NY2d at p 147), Central Hudson Gas v Public Serv. Comm. (447 US 557, 566) establishes four criteria: (1) Is the speech misleading or related to unlawful activity? (2) Is the governmental interest sought to be protected substantial? (3) How directly does the regulation advance that interest? (4) Is there a less restrictive alternative?

The Grievance Committee makes no contention that the flier is misleading. And though Section 479 has its genesis in Section 270-a of the Penal Law of 1909, it is not speech as activity but the activity to which the speech relates (here, legal services in relation to the purchase or sale of a house) with which this portion of the criteria is concerned. Neither deception nor unlawfulness can sustain application of the statute to respondent's flier, therefore.

There is, however, a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects and for which there is no adequately protective less restrictive alternative. The Supreme Court has many times recognized as a proper and sub-

stantial governmental interest the prevention of conflicts of interest (In re Primus, 436 US 412, 436 ["serious likelihood of conflict of interest"]; Ohralick v Ohio State Bar Assn., supra, at p 461, n 19 ["we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest"] and see id p 464, n 22; NAACP v Button, 371 US 415, 443 ["serious danger * * * of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent"]; see also Mine Workers v Illinois Bar Assn., 389 US 217, 223-224). Though the potential for conflict played a part in sustaining the speech limitation only in Ohralick, the reason it was held insufficiently

present in the other cases was the absence of monetary stakes for the union or other community group, whose collective activity was undertaken to assure meaningful access to the courts.

Not only is there an absence of associational activity in the instant case, but also there are present the pecuniary interests of both the attorney and the broker. Moreover, since the broker is in direct contact with his prospect (the lawyer's potential client), there is present also the in-person solicitation element which Ohralick found sufficient to sustain regulation against constitutional attack. Of importance in Ohralick's determination were the lack of sophistication of the usual client, the pecuniary interest of the solicitor, the difficulty or impossibility of

obtaining reliable proof of what occurred in such an encounter (436 US at pp 464-466). Those factors made permissible "prophylactic measures whose objective is the prevention of harm before it occurs" (id, 464). The same presumed lack of sophistication, pecuniary interest and difficulty of proof are present here. Moreover, in-person solicitation discourages the comparison shopping which is the very heart of the concept behind dissemination of information concerning legal services: to assure "informed and reliable decisionmaking" (Bates v State of Arizona, 433 US 350, 364, supra; see Reich, Preventing Deception In Commercial Speech, 54 NYU L Rev 775, 801, 804; Worsham, Solicitation by Attorneys: A Prediction And A Recommendation, 16 Houston L Rev 452, 468-471).

Nor, as Ohralick makes clear (and Primus confirms [436 US at p 434]), is it required that there be "actual proved harm to the individual (436 US at p 464). "[T]he absence of explicit proof or findings of harm or injury is immaterial" (id, 468); "the potential for overreaching * * * inherent in * * * in-person solicitation" (id) is enough to justify such a regulation (see Note, Attorney Solicitation, 7 Hofstra L Rev 755, 773-774).

Measuring against that background, we conclude that even as content regulation Section 479 should be held constitutional.[4] The possibility that the lawyer's

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4. Accord: Allison v Louisiana State Bar Assn. (362 So2d 489 [La] [solicitation through employer of employee participants in a prepaid legal services plan]). Contra: Matter of State Bar Grievance Administrator v Jaques (407 Mich 26 [solicitation of tort claims

view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the

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through union agent]); Kentucky Bar Assn. v Stuart (568 SW2d 933 [Ky] [attorney's letter to real estate broker]; and see Figa, Lawyer Solicitation Today And Under The Proposed Model Rules of Professional Conduct, 52 Colo L Rev 393, 404). It is questionable whether Jaques would be applied to a situation such as the present (see Woll v Attorney General, 409 Mich 500, 550). Both Jaques and Stuart may be distinguished on the ground that neither discussed potential conflict of interest, but to the extent that they cannot be so distinguished we decline to follow them.

improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale are examples of the conflict potential to be protected against. Nor can we agree with the Supreme Court of Kentucky (Kentucky Bar Association v Stuart, 568 SW2d 933 [Ky]) that the filing with the overseeing agency of a lawyer's solicitation letter to brokers, adequate though it may be to protect against any evils of direct mail addressed to clients (Matter of Koffler, 51 NY2d at p 150, supra), is adequate

protection against the conflict of interest problems involved in attorney mailings to brokers. It is one thing for a disciplinary system to police the language in client direct mail advertising and quite another to expect that anything approaching proper oversight can be accomplished simply by the filing of a copy of a broker letter when the client relationship results not from the letter but from the intermediation of the broker.

For the foregoing reasons, the order of the Appellate Division should be affirmed, without costs.

FUCHSBERG, J. (dissenting):

The petition of the Grievance Committee, respondent on this appeal, should be dismissed.

Whatever the prescriptions of professional "etiquette" and institu-

tional preferences may have been in the past, the Supreme Court, final arbiter of First Amendment issues, has declared that the constitutional protection accorded commercial speech will no longer abide unreasonable restrictions on the advertising of information calculated to serve "individual and societal interests in assuring informed and reliable decision-making" concerning the price and availability of at least "routine legal services" (Bates v State Bar of Arizona, 433 US 350, 364, 374; Virginia Pharmacy Board v Virginia Consumer Council, 425 US 748)[1] Essentially on this basis, in

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1. "[S]uch speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction * * *. The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent

Matter of Koffler, sweeping aside the Appellate Division's "artificial distinction between solicitation and advertising", and undeterred by section 479 of our Judiciary Law[2], we upheld a lawyer's mail solicitation of potential clients (51 NY2d

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political dialogue" (Bates, supra, at p 364; cf. Fuchsberg, Commercial Speech: Where It's At, 46 Brooklyn L Rev 389, 391).

2. Judiciary Law §479, effective September 1, 1967, anteceded Bates by ten years and has not been amended in the intervening years.

140, 143). Now, abandoning this high road, the majority, hypothesizing excesses and ignoring less restrictive means by which these may be avoided, upholds a total ban on a lawyer's mailings to realtors. In my view, on the analysis which follows, this absolute prohibition must be regarded as so unreasonable a restraint on communication as to constitute an abridgment of First Amendment rights.

Preliminarily, to move most quickly to the heart of the matter, it may be well to point to three considerations with which the majority perforce has had to agree. One is that the Code of Professional Responsibility is subordinate to the provisions of section 479 of the Judiciary Law and that this statute, in turn, must defer to our Constitutions,

State and Federal. A second is that, since Bates, lawyer advertising, though it "implicitly or explicitly involves solicitation", may no longer be proscribed per se (Koffler, supra, at p 146); rather, in Koffler, in the course of upholding the validity of direct mail advertising of the nature and price of legal services offered to homeowners as prospective clients, we recognized the validity of this postulate.[3] A third,

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3. Earlier, a similar conclusion was reached by the New York State Bar Association Committee on Professional Ethics in its Opinion #507: "[I]t seems clear to us in this era of direct-mail advertising that an advertisement * * * does not become an improper solicitation merely because it is placed in the recipient's mail box by a postman rather than a newsboy".

this time factual, is that the contents of the appellant Alan I. Greene's fliers were not false, deceptive or misleading in any way.

These noted, we express disagreement with the majority's reading of Ohralik v Ohio State Bar Assn. (436 US 447) as an out-and-out "condemnation" of all in-person solicitation (maj. slip opn at p 3). True, it held that a State Bar could constitutionally discipline a lawyer for soliciting clients "in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent" (Ohralik, supra, at p 449). It is a mistake, however, to assume from this general language that the limitation was a wide-ranging one. For Ohralik's words are self-limiting and, significantly, were uttered in the

context of a congerie of facts surrounding an extreme episode of oppressive and over-reaching importuning of the hospitalized victim of an accident. That the Court intended no blunderbuss declaration ruling out all direct solicitation, whether essayed in person or by mail, becomes apparent too from its concurrent determination in In re Primus (436 US 412). Handed down with Ohralik, Primus held a solicitation letter dispatched by an attorney employed by the American Civil Liberties Union sheltered by the First Amendment. So deciding, the Court did more than comment that the ACLU litigates both "as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public" (Primus, supra, at p 431). It also made the point,

relevant here, that, if anything, "the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct" (Primus, supra, at p 435-436).

In Koffler, we emphasized that interdiction of letters addressed to potential clients would cut across the "strong societal and individual interest in the free dissemination of truthful price information * * * in our free enterprise system" (Koffler, supra, at p 146).[4] Oddly, the majority now re-

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4. See generally, Kentucky Bar Assn. v Stuart, 568 SW2d 933 [Ky]; Bishop v. Committee on Prof. Ethic and Conduct of the Iowa State Bar Assn., __ F Supp __ [S Iowa] [decided 8/20/81]; L. Andrews, Birth of A Salesman: Lawyer Advertising and Solicitation 61-68; R. Brosnahan and L. Andrews, Regulation of Attorney Advertising: In the Public Interest?, 46 Brooklyn L Rev 423; Comment, Three Years Later: State Court Interpretation

coils from this reasoning when letters are addressed to real estate brokers whom, after all, buyers or sellers of real property conceivably may be expected to consult on the choice of a lawyer. Absent any record data, empirical or otherwise, to warrant this departure from the spirit of our earlier declaration, it offers no more than direful speculation, which, I respectfully suggest, reflects perhaps unconscious, but nevertheless impermissible, obeisance to the tastes and traditions of a pre-Bates yesteryear. (See Kentucky Bar Assn. v. Stuart, supra

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of the Attorney's Right to Advertise and the Public's Right to Information, 45 Mo L Rev 562).

[letters to real estate agencies merely stating the price of routine legal services and the qualifications of the attorneys not in-person solicitation].)

It cannot be gainsaid that a mailing to third parties contemplates interaction between their recipients and potential clients.[5] But, in principle, what Greene sought by resort to this more targeted, and presumably more cost-efficient, mail medium was simply to heighten the chances that the concededly fair and truthful message he wished to

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5. Koffler's recognition of this characteristic (supra, n 2 at p 145) did not suggest a preordained result (compare our footnote with footnote 25 in Virginia Pharmacy, 425 US 748, 773, and the Supreme Court's ensuing holding in Bates).

convey would come to the attention of those to whom it would be most useful, a perfectly sensible and acceptable, even "indispensable", objective (Bates, supra, at p 364).[6]

Needless to say, any referral system is highly dependent upon the availability of information about an attorney. Moreover, a paramount reason for the Supreme Court's support of a lawyer's right to advertise was its recognition that, in a time when

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6. Greene's fliers were mailed to all brokers in a circumscribed area -- Westchester County, where he resided and practiced, and portions of adjoining Putnam County. It was no more than logical for him to reason that an untargeted mailing to the adult members of a population of well over a million would not only have been wasteful but prohibitively expensive.

mobility and urbanization had become an integral part of our social climate, pre-Bates referral practices, attuned as they were to the far more fixed fashions of an essentially "small-town society", in which "reputational information" could be expected to be common knowledge, no longer was adequate (Bates, supra, fn 30, pp 374-375; see Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar, 12 UCLA L Rev 438, 440; Meserve, Our Forgotten Client: The Average American, 57 A.B.A. J. 1092, cf. Zaldin v Concord Hotel, 48 NY2d 107, 112).

Consequently, I find it difficult to understand how the majority, in face of our prior acceptance of the right to advertise by direct mail, can equate Greene's restrained use of that medium

with the vexatious in-person solicitation at which Orhalik strikes (see maj slip opn, at p. 10). For, at its worst, Greene's conduct, even if we were to disregard its salutary candor and written form, cannot be said to have differed in spirit and intent, for instance, from the exposure to potential clients and potential and potential recommenders that many lawyers, with full propriety, attempt to achieve by carefully structuring their social and community associations (see Bates, supra, at p 371)[7].

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7. The venerability of referrals as a source of clients has been recognized also in Ohralik, supra, n 24, at p 465; the New York Code of Professional Responsibility, EC2-8; and the American Bar Association's Proposed Draft of Model Rules of Professional Conduct, Rule 7.2, subd c.

Nor can it be said that Greene's mode of communication suffers by comparison, in morality or accountability, with the far more amorphous collection of contracts with the coterie of friends, relatives, business or social acquaintances and former clients who constitute the main source to which most lawyers engaged in private practice look for referrals.

Surely, whether a third party's recommendation of a lawyer to a consumer of legal services has been generated by personal cultivation of or a chance acquaintance with the recommender or whether the recommender's awareness of the lawyer's availability stemmed from the lawyer's correct employment of contemporary mail or media channels, common sense teaches that there is no basis for attributing greater risks of

the occasional unprofessionalism or over-commercialization, which in this imperfect world will at times occur in any quarter, to the latter rather than the former. Little wonder then that the Supreme Court has dubbed arguments which focus on fears of this character too "dubious" to survive constitutional scrutiny (see Bates, supra, at pp 369-379).

Specifically, to recite them verbatim, the suppositions on which alone we are asked to conclude that the demons of conflict of interest will be let loose are that "the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes" or that the lawyer "will not make efforts to negotiate to the lowest possible level the commission

to be paid to the broker" or that "the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale" (maj slip opn, at p 11).[8] But, even if these cynical conjectures reflected anything more than occasional vagaries, it would be outlandish for the fears the Committee

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8. In the same vein, the Grievance Committee, to justify its condemnation of the attorney, goes so far as to find cause for complaint in the argument that the respondent, whose fliers did not indicate the slightest inclination to split fees, would also "deceive the realtor, who will believe if a person is referred to the attorney, he, the realtor, will obtain something in return for the referral, when in fact he will not". To this, of course, the short answer is that frustration of any real estate agent (or any other referrer of a client) who may entertain such an expectation would be a testimonial to the unswerving probity and ethics

entertains to form the predicate for punishing facially innocent mail communications with brokers while ignoring the fact that, if the fears were founded, they would be at least as pertinent to lawyers who, enjoying personal or professional relationships with brokers, are far, far, more likely to become the beneficiaries of such referrals and the

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of the lawyer, who in any event, is held to Disciplinary Rule 2-103, which specifically states: "A lawyer shall not compensate or give anything of value to a person * * * as a reward for having made a recommendation resulting in employment by a client". It may not be remiss to add that even the realtors seem to be too freely belabored, since the record establishes that none of the recipients of the defendant's flier responded at all, much less improperly.

inheritors of the hobgoblins of client betrayal which, so unaccountably and so unevenly, appear to concern the Committee.[9] Artificial distinctions of this sort are not only indefensible, but are just the sort of things which unwarrantedly sap public confidence in the legal system.

The nature of Greene's alleged assault on the ethical standards now seen in fuller perspective, we proceed to match the mailing of his fliers

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9. Since, from the record here, mail communications may not be very productive of referrals, the fears may be academic as well as groundless. Greene received no referrals in response to his flier. The four amici, from another part of the State, fared no better.

against the criteria so lately set out by the United States Supreme Court in Central Hudson Gas v Public Serv. Comm. (447 US 557, 564-566). Reiterating the Court's position that commercial speech is subject to a State's reasonable time, place and manner regulation (Consolidated Edison Co. v Public Serv. Comm., 447 US 530, 536), that case erected a four-part analysis for testing whether a particular State regulation goes too far.

Applying the test, initially we must say whether the speech in question is misleading or related to an unlawful activity, for then it is entitled to no protection. This hurdle it easily overcomes. As indicated earlier, it is agreed that the speech here did not offend either requirement.

Secondly, we must decide whether the regulation generally is in furtherance of a substantial State interest. This too need not detain us. Since the possibility of deceptive or unethical conduct always exists in the abstract at least, a legitimate State interest may be said to exist.

This brings us to the third level of inquiry, i.e., evaluation of "the directness of relation of regulation to purpose" (Koffler, supra, at p 148). For the reasons more fully detailed above, the regulation here did not measure up. Greene's mailings involved no professional trespass. Not all lawyer mailings invite the ethical departures the Committee envisaged. Such departures certainly are not the inevitable result of all direct mail advertising. The one before us only

concerned information about price and availability and, as such, was in accord with Ethical Consideration 2-8 of the Code of Professional Responsibility of the American Bar Association (see also New York's Code of Professional Responsibility EC 2-8 in McKinney's Vol 29, §500 to end, pocket part [1980-1981], p 45). Disseminating this information serves a useful rather than a harmful individual and societal function. The Supreme Court has "declined to uphold regulations that only indirectly advance the state interest involved" (Central Hudson Gas v Public Service Comm., supra, at p 564). The regulation here, therefore, was unreasonable, and, consequently, must fall on that account.

Finally, we determine whether less restrictive measures were available to

the State. For the regulatory technique may not be disproportionate to the interest served. Obviously, since the communication here was not a transitory oral one, but made by mail, a filing requirement or one that calls for an appropriate disclaimer might have been an available and practical alternative (see Bates, supra, at p 384; Koffler, supra, at p 150; Kentucky Bar Assn. v Stuart, supra, at p 934; ABA Proposed Draft of Model Rules, supra, rule 7.2 subd b and comment).[10] Yet, the

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10. This is not intended as an endorsement of the procedures mentioned, either in isolation or in preference to other methods. Rather, mention is made of these measures merely to demonstrate that less restrictive regulatory means are available or can be developed.

Committee offered no adequate explanation for failing to engage these or other lesser methods by which to assure that the regulatory scheme was not more extensive than necessary to serve the governmental interest at stake. Instead, imposing an unwarranted absolute prohibition, it chose a means unreasonably and insufficiently related to the purpose to be served.

It follows that the order of the Appellate Division should be reversed and the petition dismissed.

* *

Order affirmed, without costs. Opinion by Meyer, J. All concur except Fuchsberg, J., who dissents and votes to reverse in an opinion in which Cooke, Ch. J., concurs.

Decided October 29, 1981

APPENDIX C

A Message of Importance to All Realtors...

Are

you giving

your clients

the

VERY BEST

service

?

When buying or selling a home, people seek the services of realtors for a variety of reasons. Perhaps the most important reason is the money and time an experienced realtor can save for an individual.

Legal fees for house closings can become astronomical when your client's attorney works on a percentage basis.

ALAN I. GREENE *offers your client full legal representation on any and all property transactions for just $335. Legal coverage begins with contract and continues through to closing. With 18 years experience, the office of* **ALAN I. GREENE** *is fully prepared to expedite all closings and offer competent advice to the buyer and/or seller. Your real estate office will be afforded our full cooperation. With just two hours notice, a contract and all legal documents can be prepared.*

By recommending the services of **ALAN I. GREENE**, *you, the realtor, will save your client time and money—one of the main reasons they called on you!*

Alan I. Greene

Attorney at Law

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APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL
DEPARTMENT

In the Matter of ALAN I. GREENE,
an Attorney and Counsellor-at-Law:

GRIEVANCE COMMITTEE
FOR THE
NINTH JUDICIAL DISTRICT

Petitioner

-against-

ALAN I. GREENE,

Respondent.

REFEREE'S REPORT

By Order of this Court dated October 29, 1979, the undersigned was designated as Referee, to hear and to report, with findings upon each of the issues in this disciplinary proceeding. A hearing was conducted by the under-

signed on January 30, 1980. A transcript of the proceedings is annexed hereto. Also submitted are documents which were received in evidence.

THE CHARGES

Respondent has been charged with professional misconduct in that he prepared and caused to be mailed approximately one thousand direct-mail flyers to real estate brokers in Westchester County and part of Putnam County. It is alleged in the Petition that these flyers directly solicited real estate brokers to refer individuals to the Respondent to use the Respondent's legal services in connection with the sale or purchase of real property. It is alleged that such conduct violated §479 of the Judiciary Law, and the Code of Professional Responsibility adopted by

the New York State Bar Association.

THE FACTS

There are no disputed issues of fact. Respondent was admitted to practice on June 20, 1960. He has an office in Westchester County. Respondent admits that in August 1978 and in October 1978 he caused to be prepared and caused to be mailed approximately one thousand direct-mail flyers to real estate brokers in Westchester County and portions of Putnam County. The sole issue is one of law. Petitioner contends, and Respondent denies, that the mailing of such flyers to real estate brokers violated the Judiciary Law and the Code of Professional Responsibility.

FINDINGS

I find that the flyer which was mailed by the Respondent to some one

thousand real estate brokers (Exhibit A) comes squarely within the holding of this Court in Matter of Koffler, 70 A.D. 2d 252. In Koffler, decided October 1, 1979, this Court dealt with two attorneys who had sent letters to home-owners and to real estate brokers with respect to house sales. This Court in Koffler held that the letter sent to the brokers constituted a solicitation and, as such, violated §479 of the Judiciary Law and DR2-103(A) of the Code of Professional Responsibility.

Based on the analysis by this Court of the letter sent to brokers in Koffler, I find that the flyer sent to brokers by the Respondent herein was a solicitation such as was condemned by the Court in Koffler. There is little difference between the letter sent to the brokers

in Koffler and the flyer sent to brokers by the Respondent herein. I find that such solicitation was a violation of §479 of the Judiciary Law and of the Code of Professional Responsibility.

In mitigation, it is noted that the flyers mailed by the Respondent herein were mailed in 1978, more than a year before the decision in Matter of Koffler. Respondent testified that in mailing the flyers he did so in reliance on Bates v. State Bar of Arizona, 433 U.S. 350. The Bates case is, of course, the landmark 1977 United States Supreme Court decision involving advertising by lawyers.

It is also noted that in Koffler this Court held:

> "***since the letters were apparently sent in good faith, though in mistaken reliance on the Bates decision, the respondents should neither be disbarred, suspended nor censured."

With respect to the mailing of the flyers by the Respondent herein, it would seem that he is no more culpable than the attorneys in Koffler.

Dated: February 21, 1980

Respectfully submitted,

_____

MORTON B. SILBERMAN

APPENDIX E

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 22, 1980.

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,)
HON. LEON D. LAZER,)Associate
HON. GUY J. MANGANO,)Justices
HON. DAVID T. GIBBONS.)

In the Matter of Alan I. Greene, an attorney (admitted to practice as Alan Ira Greene).

The Grievance Committee for the Ninth Judicial District,

Petitioner;

Alan I. Greene,

Respondent.

A disciplinary proceeding having been instituted in this court upon the petition of the Grievance Committee for the Ninth Judicial District in respect to Alan I.

Greene, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department, on June 20, 1960, under the name Alan Ira Greene; the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated April 12, 1979; and the respondent having filed an answer thereto; and this court, by an order dated October 9, 1979, as amended by a further order of this court dated October 29, 1979, having referred the issues raised by the petition and the answer to Hon. MORTON B. SILBERMAN, a former Justice of the Supreme Court, as Referee, to hear and to report, with his findings upon each of the issues; there-

after, the said Referee having held a hearing and having filed his report with this court on February 25, 1980, together with a transcript of the hearing and the exhibits; and the petition and the respondent having moved by notices of motion, both dated February 26, 1980, to confirm the said report;

Now, on reading and filing the said petition verified April 12, 1979; the said answer verified May 9, 1979; the petitioner's notice of motion and the affidavit of Richard E. Grayson in support of the said motion; the respondent's notice of motion and the affirmation of Jeremiah S. Gutman in support of respondent's motion; and upon all the papers filed herein; and the proceeding having been submitted by Richard E. Grayson, Esq., of counsel for the

petitioner and submitted by Jeremiah S. Gutman, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon the PER CURIAM OPINION herein, dated December 12, 1980, heretofore filed and made a part hereof, it is

ORDERED that, in accordance with the said OPINION, the said motions to confirm the report of the Referee are hereby granted.

Enter:

Clerk of the Appellate Division.

APPENDIX F

December 22, 1980.

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

MOLLEN, P.J., HOPKINS, LAZER, MANGANO and GIBBONS, JJ.

In the Matter of ALAN I. GREENE, an attorney (admitted to practice as ALAN IRA GREENE).

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner;

ALAN I. GREENE,

Respondent.

Nos. 1602 & 1603

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. By order of this

court dated October 9, 1979, as amended by a further order of this court dated October 29, 1979, the issues were referred to Honorable MORTON B. SILBERMAN, a retired Justice of the Supreme Court, to hear and report.

Donald E. Humphrey, White Plains, N.Y. (Richard E. Grayson of counsel), for petitioner.

Levy, Gutman, Goldberg & Kaplan, New York, N.Y. (Jeremiah S. Gutman of counsel), for respondent.

P E R C U R I A M. The respondent was admitted to practice by the Appellate Division, First Judicial Department, on June 20, 1960. In this proceeding to discipline him for professional misconduct, the petitioner and the respondent move to confirm the report of the referee to whom the issues were referred for hearing and report.

The respondent was charged with professional misconduct in that during the months of August and October of 1978, he prepared and caused to be mailed approximately 1,000 direct-mail flyers to real estate brokers in Westchester and Putnam Counties. These flyers "directly solicited the real estate brokers to refer individuals to the respondent to use the respondent's legal services in connection with the sale or purchase of real property." It was alleged that the respondent thereby violated section 479 of the Judiciary Law and the Code of Professional Responsibility.

The respondent admitted the activities which are the basis for the charges herein but stated that in mailing the flyers he did so in reliance on the decision of the United States Supreme Court in Bates

v State Bar of Ariz. (433 US 350).

While the referee found that the respondent did engage in the activities alleged, he pointed out that the flyers were mailed by the respondent in 1978, more than a year before this court's decision in Matter of Koffler (70 AD2d 252), which prohibited this type of activity. It should also be noted that the referee's report was prepared prior to the Court of Appeals reversal of Koffler on October 21, 1980 (51 NY2d 140).

The Court of Appeals stated (pp 144-145):

> "We do not, however, pass upon direct mail solicitation of clients through materials addressed to third persons, preferring to leave determination of that question, distinguishable as it is in a number of ways from direct client solicitation by letter[2], for a matter in which a more complete record has been made and there has been more

> extensive consideration by the Appellate Division, in which is vested primary jurisdiction in matters of discipline."

The court explained in the footnote (p 145):

> "2. For example, third person mailings will, if their ends are to be achieved, almost always involve in-person solicitation by the intermediary, and are, therefore, much closer to speech of the type Ohralik v Ohio State Bar Assn. (436 US 447) has held can be proscribed (cf. Matter of State Bar Grievance Administrator v Jacques, 407 Mich 26, 51 [COLEMAN, Ch. J., dissenting])."

Therefore, Matter of Koffler (51 NY2d 140, supra) is not dispositive of the instant situation where we are dealing with direct mail solicitation of clients through materials addressed to third persons. Third person mailings of the type engaged in by the respondent require the real estate broker to make in-person solicitation of potential clients

of the respondent. We believe this to be clearly proscribed by section 479 of the Judiciary Law and not constitutionally protected.

After reviewing all of the evidence, we are in full agreement with the findings contained in the report of the referee. Accordingly, the petitioner's and the respondent's motions to confirm said report are granted. Although we find the respondent guilty we are mindful of his reliance on Bates v State Bar of Ariz. (433 US 350, supra) and we therefore impose no measure of discipline.

APPENDIX G

Opinion #16
Issued 10/15/80

THE GRIEVANCE COMMISSION
OF THE
BOARD OF OVERSEERS OF THE BAR

QUESTION

The Grievance Commission has been asked by a lawyer if it would be permissible under the Maine Bar Rules for that lawyer to mail a letter soliciting employment, as follows:

(letterhead)

Dear _____

I understand that your _____ has recently sustained injuries in an accident. It has been my experience that many people are unaware that they may be entitled to compensation for their injuries even in situations such as automobile accidents where it appears

that the person seeking compensation was at fault or where it appears that no one was at fault.

I am attempting now to concentrate my practice in the area of cases involving serious personal injuries or death and probate (settling the affairs of persons who have died). I am attempting this concentration in hopes that it will better allow me to serve the needs of clients who have suffered serious personal injuries or who are the heirs or representatives of persons who have died.

Pursuant to the Maine Bar Rules, Rule 3.9, I am not allowed to make any unwarranted suggestions or promises of benefits or to contact you under circumstances which create a risk of undue influence. If, however, after reviewing my letter and giving careful considera-

tion to the possibility that there may be some right to compensation for the injuries suffered in the recent accident, you wish to contact me or another attorney to check into this matter further feel free to do so.

Should you choose to contact me, you should be aware that it is my practice not to charge for an initial office interview for the purpose of evaluating whether there may be a potential claim. You should also be aware that the most common types of fee arrangements which I enter into in cases involving serious injuries or death are what are known as contingent fees, in which my fee is based upon a percentage of the amount of compensation recovered for the injured party, or a fee based on an hourly rate. In handling cases on an

hourly rate, I simply charge an agreed rate per hour billed monthly to the client. By requirement of the probate courts, all probate cases are handled on an hourly rate.*

In the event that you and the injured party wish to discuss the possibility of securing some compensation for the injuries with me, simply call my secretary and arrange an appointment for a time which is mutually convenient.

Sincerely yours,

*The Commission is doubtful as to the factual accuracy of this statement.

OPINION

Maine Bar Rule 3.9 governs and regulates advertising and solicitation by Maine lawyers. Because the lawyer's letter referred to above is intended to be sent to an individual and pertains to a singular situation involving personal injury, the propriety of the lawyer's conduct in sending the letter is governed by sub-section (f) of that Rule which prescribes the standards by which lawyer solicitation must be measured. Maine Bar Rule 3.9(f) provides:

> (f) Recommendation or Solicitation of Employment.
>
> (1) A lawyer shall not solicit employment on behalf of himself or any lawyer affiliated with him through any form of personal contact:

(i) By using any statement, claim, or device that would violate this rule if part of a public communication;

(ii) By using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or engaging in deceptive, vexatious, or harassing conduct; or

(iii) When the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited. Without limitation, such circumstances will be deemed to exist as to the person solicited if he is in the custody of a law enforcement agency or under treatment in a

hospital, convalescent facility, or nursing home, or if his mental faculties are impaired in any way or for any reason. Notwithstanding the foregoing, such circumstances shall be deemed not to exist when a lawyer is discussing employment with any person who has, without solicitation by the lawyer or anyone acting for him, sought the lawyer's advice regarding employment of a lawyer.

(2) A lawyer shall not compensate, or give anything of value to, a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communication

permitted by these rules and may pay the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(3) A lawyer shall not knowingly assist or authorize any other person or organization to engage in conduct that would violate this rule if engaged in by the lawyer personally, nor shall a lawyer accept employment when he knows, or it is obvious, that the person who seeks his services does so as a result of conduct prohibited under this rule.

It is the opinion of the Commission that the letter must be treated as an indirect solicitation of the accident victim even though it is addressed to a relative. Since it is the accident victim who has

the claim in which the lawyer is interested, it is obvious that the letter is intended to be communicated to him by the recipient. This conclusion is reinforced by the last paragraph of the letter which states that if the addressee or "the injured party" wish to discuss the potential claim with the letter writer, he would be glad to oblige.

It cannot be said, however, that it would be a per se violation of the rule for the lawyer to send the letter in question. Indeed, the letter appears to be carefully drafted with a view to complying with the standards contained in Rule 3.9(f). The letter itself, however, tells only half the story. Since, as indicated above, the letter must be taken as having been directed to the accident

victim, the rule would be violated if it were received by him while under treatment in a hospital or under the other circumstances set forth in sub-section (1)(iii).[1]

It is conceivable that a lawyer could have made inquiry to satisfy himself that the accident victim had been discharged from the hospital and that the circumstances did not otherwise "create an appreciable risk of undue

[1] The Commission takes this opportunity to observe that the prohibition of Rule 3.9(f)(1)(iii) is framed in terms of "appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited." Explicit proof or findings of harm or injury is immaterial. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912, (1978).

influence by the lawyer or ill-considered action by the person being solicited". The Commission is of the opinion that the rule would not be violated if a lawyer had taken such steps to assure that the circumstances deemed in the rule to constitute a violation did not in fact exist even if, by some mischance, as in the case of a sudden relapse by the accident victim, the letter were nevertheless received by him while back in the hospital. The Commission believes that where, despite the fact that reasonable precautions are taken and good faith is exercised by the lawyer, a solicitation inadvertently occurs under circumstances described in sub-section iii, the policy of the rule will be satisfied by simply barring the lawyer from accepting the case if he should later be requested to under-

take it.

APPENDIX H

Legal Ethics Opinions, No. 431, Page 10

Guideline No. 15. Letters.

> Subject to the rules and guidelines relating to solicitation and to the content of advertising, a lawyer may advertise by mailing letters.

Discussion: Letters as forms of advertising have presented difficult problems, perhaps because they can be subject to abuse as a substitute for in-person solicitation. If letters are otherwise proper in content, and are properly distributed, they are permissible advertisements. See Kentucky Bar Assoc v. Stuart, 568 SW2d 933 (KY 1978); (letters mailed to real estate agencies setting forth fees for routine legal services and other information did not constitute impermissible solicitation). Letters

that contain improper content or are distributed in an improper manner so as to constitute prohibited solicitation, are not allowed.

Opposition

FILED
FEB 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1406

In The

Supreme Court of the United States

October Term, 1981

ALAN I. GREENE,

Petitioner,

vs.

IN THE MATTER OF ALAN I. GREENE, AN ATTORNEY (ADMITTED TO PRACTICE AS ALAN IRA GREENE). THE GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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RICHARD E. GRAYSON
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No. 81-1406

In The

Supreme Court of the United States

October Term, 1981

ALAN I. GREENE,

Petitioner,

vs.

IN THE MATTER OF ALAN I. GREENE, AN ATTORNEY (ADMITTED TO PRACTICE AS ALAN IRA GREENE). THE GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent's brief is submitted in opposition to the petition for a writ of certiorari, which is based on a decision of the New York Court of Appeals, entered on October 29, 1981. *Matter of*

Greene, 54 N.Y. 2d 118 (1981). This decision sustained an order of the Appellate Division of the New York State Supreme Court, Second Judicial Department, which found that petitioner had improperly solicited clients via direct mail. *Matter of Greene,* 78 A.D. 2d 133 (Second Department, 1980).

STATEMENT OF THE CASE

In August and October of 1978, petitioner Greene mailed approximately 1,000 flyers to real estate brokers in Westchester and Putnam Counties in the State of New York. Respondent received a complaint concerning petitioner's flyers and opened a complaint file on November 15, 1978.

On February 5, 1979, respondent filed a confidential report with the New York State Appellate Division, Second Judicial Department, and requested authorization from that court to institute a disciplinary proceeding. Appellate Division Rule 691.4(e)(5) [22 NYCRR §691.4(e)(5)].

By order dated February 16, 1979, the Appellate Division, Second Judicial Department, authorized respondent to institute a disciplinary proceeding against petitioner. Greene was charged with violating New York State Judiciary Law §479 and Disciplinary Rule 2-103(A) of the Lawyer's Code of Professional Responsibility as adopted by the New York State Bar Association.

The hearing in the disciplinary proceeding was held on January 30, 1980, and the referee's report was filed with the Appellate Division on February 25, 1980.

In his report, the referee found that petitioner's actions constituted solicitation within the Appellate Division's holding in *Matter of Koffler and Harrison,* 70 A.D. 2d 252, 420 N.Y.S. 2d 560 (Second Department, 1979). The Appellate Division, in

its order of December 22, 1980, confirmed the referee's report but "impose[d] no measure of discipline." *Matter of Greene,* 78 A.D. 2d 131, 133, 433 N.Y.S. 2d 853 (Second Department, 1980).

Greene thereafter appealed this matter to the New York Court of Appeals, which, on October 29, 1981, in finding a conflict of interest, affirmed that his conduct violated Judiciary Law §479. *Matter of Greene,* 54 N.Y. 2d 118 (1981).

In the interim, by order dated April 9, 1981, Greene was indefinitely suspended from the practice of law by the Appellate Division, Second Judicial Department on grounds of incapacity. The Court also stated that "[The Grievance Committee] further indicates that there are many serious complaints of professional misconduct pending against this attorney. Under the present circumstances [Greene] would be unable to participate in a formal disciplinary hearing." *Matter of Greene,* ____ A.D. 2d ____, *New York Law Journal,* April 28, 1981, Page 1, Column 4.

It is a matter of public record that on November 12, 1981, Greene was indicted by a Westchester County (New York) Grand Jury on nine felony counts of stealing from clients: eight felony counts of grand larceny in the third degree and one felony count of engaging in a scheme to defraud in the first degree. That matter is now pending.

ARGUMENT

I.

The decision below does not conflict with the decisions in other states.

Petitioner cites a Michigan case, *In the Matter of State Bar Grievance Administrator v. Jaques,* 407 Mich. 26, 281 N.W. 2d 469 (1979) as supporting his claim of a conflict among the states. In that Michigan case, an attorney requested the business agent for a union to recommend employment of him to members and their survivors to handle their claims resulting from an explosion. The Michigan Supreme Court had ordered the attorney suspended from practice. 401 Mich. 516, 258 N.W. 2d 443 (1977). This Court then decided *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447 (1978). Thereafter, this Court vacated the *Jaques* decision and remanded. 436 U.S. 952 (1978). After reviewing this Court's decision in *Ohralik,* the Michigan Supreme Court held in a five to two decision that attorney Jaques' actions did not rise to the level of "vexatious conduct" which state disciplinary rules may seek to prevent. *Ohralik,* 462.

Jaques is distinguishable from the case in question for three reasons. First, the Michigan court, in its majority decision, failed to address the issue of conflict of interest, which underpins the New York State Court of Appeals decision. In the decision below, the court in *Matter of Greene* listed only some of the potential conflicts of interest that may occur when an attorney solicits clients through real estate brokers:

> "The possibility that the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the

> improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or to suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale are examples of the conflict potential to be protected against." (Pet. App. B26-28).

Although the majority in *Jaques* did not discuss the conflict of interest questions, the dissent, written by Chief Justice Coleman, carefully considered that issue. She stated, in part:

> ". . . there is nothing inherent in the use of a personal intermediary which will necessarily remove the possibility of overreaching, undue influence, and invasion of privacy that the state has a right to prevent.
>
> The potential for overreaching or undue influence is substantial when the intermediary solicits the potential client in person. The intermediary may also be a professional, such as a salesperson, trained in the art of persuasion." 281 N.W. 2d 476-77.

Let it not be forgotten that the people Greene approached via direct mail to solicit clients on his behalf were professional salespeople in the guise of real estate brokers.

The Michigan chief justice in *Jaques* quoted from *Ohralik* at page 457 when she opined that such in-person solicitation through intermediaries, like in-person solicitation by an attorney,

"may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." 281 N.W. 2d at 477. The conflict of interest discussion in the *Jaques* dissent continued:

> "The nonlawyer intermediary may be more likely to misstate the applicable law or the client's legal remedies, either through inadvertence or ignorance or on purpose, in attempting to persuade the client to employ a specific attorney. The intermediary may even attempt more extreme, less ethical conduct than an attorney might use in soliciting clients because a nonlawyer intermediary might not feel bound to adhere to the standards incorporated into the Code of Professional Responsibility." *Id.*

A second reason why *Jaques* is distinguishable from the instant case is that the former decision might not even be applied in Michigan to a case such as that before this Court. Some fourteen months after that case was decided, the court retreated a bit from *Jaques* in *Woll v. Kelley,* 409 Mich. 500, 297 N.W. 2d 578 (1980). *Woll* dealt with a statute prohibiting solicitation by an attorney. In that case, the Michigan Supreme Court upheld the constitutionality of a statute that prohibited direct or indirect solicitation of a person injured in an accident for the purpose of representing that person in claiming damages or prosecuting an action arising out of a personal injury claim. Mich. Comp. Laws §750.410(1). That statute provides:

> "Any person, firm, copartnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, copartnership, association or organization of any kind, either incorporated or

unincorporated, or of any division, bureau or committee of that association or organization, either incorporated or unincorporated, who shall directly or indirectly, individually or by agent, servant, employee, or member, solicit a person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person for the purpose of representing that person in making a claim for damages or prosecuting an action or causes of action arising out of a personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of that solicitation, is guilty of a misdemeanor, and shall upon conviction thereof, if a natural person, be punished by a fine not to exceed $500.00, or by imprisonment for a term not to exceed 6 months, or both. The same penalties shall apply upon conviction to a member of a copartnership, or an officer or agent of a corporation, association or other organization, or an officer or agent, who shall consent to, participate in, or aid or abet a violation of this section upon the part of the copartnership of which he is a member, or of the corporation, association or organization of which he is such an officer or agent. A contract entered into as a result of such solicitation is void. This subsection shall not affect an unsolicited contract entered into by a person, firm, or corporation with an attorney duly admitted to practice law in this state."

This statute should be compared with New York State Judiciary Law §479 (Pet. 2), which Greene attacks. The main elements of the two statutes are similar except for one minor

difference — the Michigan law is restricted to claims for damages for personal injury, while the New York statute specifies no such limitation.

Appellant Woll also argued that Mich. Comp. Laws §750.410(1) was invalid because it resulted in unequal treatment of defendant-attorneys charged with solicitation that violated a criminal statute. 297 N.W. 2d at 591. He claims that his allegedly criminal conduct should be treated the same as that of attorneys who are charged with violating a civil solicitation statute, *i.e.*, the resulting contracts are void. Mich. Comp. Laws §600.919(2). That statute states:

> "(1) The measure of the compensation of members of the bar is left to the express or implied agreement of the parties subject to the regulation of the supreme court.
>
> (2) Any agreement for such compensation, or for reimbursement of any expenses, incident to the prosecution or defense of any claim by any party is wholly void if such professional employment was solicited by the member of the bar, or by any other person acting on his behalf or at his request, unless the services of such member of the bar were first requested by such party."

The Michigan Supreme Court, in its unanimous *Woll* decision a mere fourteen months after *Jaques*, did not describe Mich. Comp. Laws §600.919(2) as invalidated by *Jaques*. Indeed, despite the finding that attorney Jaques is free to solicit clients through intermediaries under the Michigan court's analysis of *Ohralik*, the two Michigan statutes quoted above which bar solicitation and render solicited contracts void, are still the law in that state.

In further support of the Grievance Committee's contention that *Jaques* is *sui generis,* attention must continue to be focused on *Woll.*

> *"Ohralik* still might be read as allowing a prohibition of all communications with potential clients by the lawyer or someone acting solely for him, but even this may be too broad a proscription. Consider, for example, a runner who distributes business cards. One might say that *Ohralik* protects such conduct because the potential client has an opportunity to reflect before calling the lawyer. On the other hand, there is a risk of overreaching and undue influence — untrue representations might be made by the runner. The risk that some runners might make untrue representations might be thought to justify a ban on the distribution of business cards as a prophylactic measure." 297 N.W. 2d at 600.

The third ground on which *Jaques* can be distinguished from the *Greene* case is that the Michigan court appeared to misinterpret *Ohralik.* The majority in *Jaques* stated that "The careful language with which the Supreme Court framed its holding manifestly suggests that disciplinary rules may not prohibit attorney solicitation per se." *Jaques,* 281 N.W. 2d at 470. However, Justice Powell in *Ohralik* uses language which must lead to a conclusion opposite to that reached by the Michigan court. He put the legal profession on notice that third-person solicitation may be dealt with in a manner similar to that of the first-person solicitation in *Ohralik.* "Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems." 436 U.S. at 464, n. 22

In view of the above analysis, the *Jaques* decision should be read as only applying to the facts on which it was based, which are distinguishable from the facts in the decision below. Therefore, there is no conflict between the courts of last resort of Michigan and New York.

The other case that Greene cites to support his theory of conflict among the states is *Kentucky Bar Assn. v. Stuart,* 568 S.W. 2d 933 (Ky. 1978).

In that case, attorneys mailed letters to real estate brokers advising them that the former handled real estate work.

In view of petitioner Greene's attempt to link his case with the Kentucky decision, the letter that precipitated the latter case follows:

> "This is to advise you that our office handles all aspects of legal work concering real estate transactions. Our fees are as follows:
>
> | | |
> |---|---|
> | Opinion of title: | 50.00 |
> | Deed preparation: | 15.00 |
> | Mortgage preparation: | 15.00 |
>
> We guarantee that every Opinion of Title from our office is researched by an approved attorney who is a member of the Kentucky Bar Association. We also guarantee that if there are no objections to title or encumbrances which must be resolved as to the title, that our opinion will be delivered to the lending institution within 48 hours of the date of your order.
>
> We thank you for your time and consideration in this matter.
>
> Sincerely yours,
> Thompson & Stuart"

Nevertheless, *Stuart* is distinguishable from the case in question. The Kentucky Supreme Court, as did its Michigan brethren in *Jaques, supra,* failed to consider the conflict of interest issue, which was paramount in the decision below. In *Stuart,* the court merely recited that the letters sent by the Michigan attorneys did not "constitute 'in-person solicitation,' " citing *Ohralik.* 568 S.W. 2d at 934. The Kentucky court also failed to consider the express warning of Justice Powell in *Ohralik,* 464, n. 22, *supra,* that solicitation through the use of intermediaries is as rife with potential problems as is first-person solicitation.

Indeed, *Stuart* supports the respondent-Grievance Committee's claim that the conflict of interest issue was not even considered in the Kentucky case. The *Stuart* opinion states that "Because the letters are a form of advertisement and not 'in-person solicitation,' they are protected, unless the [Bar] Association can demonstrate sufficient justification for prohibition." 568 S.W. 2d at 934. The court then goes on to briefly discuss two possible justifications for prohibition: greater potential for deception and overreaching, and the difficulty of enforcement of ethical standards for attorney advertising.

It answers the issue of potential deception and overreaching in three sentences. The gist of those sentences is that there is no more likelihood of deception and overreaching in a letter than there is in an advertisement, and in any event, the letters themselves are protection against such abuse. *Id.*

The second potential justification for prohibiting this form of solicitation is addressed with more brevity by the Kentucky court, this time in two sentences. It stated, in essence, that the fact that the Kentucky bar association took on this case is proof that ethical standards can be enforced in the field of attorney advertising. *Id.*

Nowhere in the *Stuart* decision is there any recognition of the potential public perils pointedly published in the decision below and in the dissent in *Jaques, supra.* For that reason, *Stuart* also should not be considered as supporting Greene's theory of a conflict among the states on the issue before this Court.

Petitioner neglected to point out that Louisiana also prohibits attorney solicitation through intermediaries. *Allison v. Louisiana State Bar Association,* 362 So. 2d 489 (La. 1978).

Greene also alleges that the decision below conflicts with the ethics opinions that he cites from the bar associations of Maine and Oregon. However, both the Maine and Oregon ethics opinions are merely *advisory.* Maine Bar Rule 7(c)(3); unpublished policy of the Board of Governors of the Oregon State Bar. Rule 17.1(c) of this Court states that a review on writ of certiorari may be granted when state courts of last resort have rendered conflicting decisions on federal questions. 28 U.S.C. U.S. Sup. Ct. Rule 17.1(c). That is precisely the provision that petitioner claims as justification for the issuance of a writ of certiorari. However, by definition, and contrary to his claim, the New York State decision cannot "conflict with the decisions in other states [*i.e.*, Maine and Oregon]" [Rule 17.1(c)] for the reason that there have been no decisions rendered by the high courts of those two states on this issue. Greene certainly cannot logically argue that non-binding ethics opinions of state bar associations constitute the decisions of state courts of last resort.

In view of the fact that there is no conflict between New York and any other sister state on this issue, there is no dispute to be put before this Court.

II.

Under doctrines propounded by this Court, the New York State courts have the right to regulate the use of direct mail by attorneys.

On January 25, 1982, the day before the date on the petition for a writ of certiorari, this Court issued its latest decision in a lineage that dates to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Justice Powell, writing this Court's unanimous decision *In the Matter of R.M.J.*, ____ U.S. ____, 42 CCH S. Ct. Bull. B1100 (1982), reaffirmed the stance that:

> ". . . the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated. False, deceptive, or misleading advertising remains subject to restraint, and the Court recognized that advertising by the professions poses special risks of deception — '[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.' 433 U.S. at 383. (Footnotes omitted.)
>
> * * *
>
> The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling." 42 CCH S. Ct. Bull. at 1109-10, 1111.

It is undisputed that Greene's flyer is not inherently misleading. But "[e]ven when a communication is not misleading, the state retains some authority to regulate." *R.M.J.*, at 1112. It is at that point that the state must address the four-part test enunciated in *Central Hudson Gas Co. v. Public Service Commission,* 447 U.S. 557, 563 (1980). As was stated in *R.M.J.*: "[T]he *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public." 1113, n. 15.

Under the *Central Hudson* test, both petitioner and respondent agree that the first two parts of the test pose no problem. Part One — The flyer is protected by the First Amendment and is not misleading. Part Two — The asserted governmental interest is substantial.

It is the last two parts of this test that are crucial to a determination of the constitutionality of the state action concerning Greene.

Part Three — Does regulation of this type of solicitation directly advance a substantial governmental interest? As the court below stated:

> "There is, however, a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects and for which there is no adequately protective less restrictive alternative. The Supreme Court has many times recognized as a proper and substantial governmental interest the prevention of conflicts of interest (*Matter of Primus,* 436 U.S. 412, 436 ["serious likelihood of

> conflict of interest"]; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 461, n. 19, *supra* ["we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest"], and see *id.*, at p. 464, n. 22; *NAACP v. Button*, 371 U.S. 415, 443 ["serious danger . . . of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent"]; see, also, *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 223-224). Though the potential for conflict played a part in sustaining the speech limitation only in *Ohralik*, the reason it was held insufficiently present in the other cases was the absence of monetary stakes for the union or other community group, whose collective activity was undertaken to assure meaningful access to the courts." (Pet. App. B22-24).

The litany of conflicts of interest includes deceptions that may be committed by the attorney upon the broker as well as those that may be committed by the attorney upon his client. A deception in the former category may come about when the broker believes that by referring clients to the lawyer, he (the broker) may benefit somehow from the establishment of this referral relationship. If the lawyer does not, in fact, intend to bestow any benefit upon the broker (*e.g.*, reduced fees for legal advice or even free legal services), then the broker, indeed, may be the victim of a deception.

The possible deceptions that could be committed upon the client by his attorney are much more numerous. For example, the real estate broker may expect that, in return for referring clients, the attorney will protect the broker's interest, despite the fact that his interest may be contrary to the interest of the

attorney's client, *e.g.* the reduction of the broker's commission. If the broker's expectation is, indeed, fulfilled by the attorney to the detriment of the latter's client, a deception has occurred.

Another deception upon the client may occur where the marketability of title is questionable. In that case, a conflict develops between the broker's interest in consummating the transaction (and therefore obtaining a commission) and the buyer's interest in seeing that he will be able to resell the property.

The client who retains a lawyer upon the recommendation of a real estate broker is entitled to believe that the legal advice he is receiving is not tainted by any action the attorney has taken to protect the broker's interest to the detriment of the client. If the situation were otherwise, the client would be the victim of a deception.

As this Court noted in *Ohralik,* there is no requirement that there be "actual proved harm to the solicited individual" (436 U.S. at 464), and "the absence of explicit proof or findings of harm or injury is immaterial." *Id.,* at 468. "[T]he potential for overreaching that is inherent in . . . in-person solicitation of professional employment" is sufficient to justify "the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public." *Id.*

Since the regulation does directly advance a substantial state interest, the fourth part of the *Central Hudson* test must be applied.

Part Four — Is the regulation more extensive than necessary to serve the governmental interest?

Although the Kentucky court in *Stuart, supra,* 568 S.W. 2d at 934, deemed that the filing with the appropriate bar association

of an attorney's solicitation letter to brokers is adequate protection, such a filing cannot adequately protect the public. As the decision below states:

> "[the filing as called for in *Stuart*], adequate though it may be to protect against any evils of direct mail addressed to *clients (Matter of Koffler,* 51 N.Y. 2d 140, 150 . . .), [cannot be] adequate protection against the conflict of interest problems involved in attorney mailings to *brokers.* It is one thing for a disciplinary system to police the language in client direct mail advertising and quite another to expect that anything approaching proper oversight can be accomplished simply by the filing of a copy of a broker letter when the client relationship results not from the letter but from the intermediation of the broker." (Pet. App. B28-29) (Emphasis in original.)

The state regulation is no broader than necessary to protect the substantial governmental interests.

This Court's decision in *R.M.J., supra,* does not address the issue presented in the case in question. *R.M.J.* determined that a Missouri Supreme Court rule regulating advertising by lawyers was an invalid restriction in that it: (1) improperly restricted a lawyer to using only court-dictated language in listing his areas of practice; (2) improperly prohibited a lawyer from listing the courts and states in which he is admitted to practice; and (3) improperly prohibited a lawyer from mailing announcement cards to persons other than those authorized in the rule.

The only one of the three above issues that even comes close to relating to the case at hand is the third. Yet there is no prohibition in New York State, as there was in Missouri.

Justice Powell, speaking for a unanimous Court in *R.M.J.*, took note of the "silent record." 1115. To stretch *R.M.J.* in an attempt to tie it to petitioner's case is to give the former decision an elasticity that it does not warrant.

III.

Petitioner's due process rights were not abridged by the state statute in question.

Contrary to petitioner's claim in his Point III, he received constitutionally adequate notice that his action in soliciting business through intermediaries was not validated by *Bates*.

In *Boyce Motor Lines v. United States*, 342 U.S. 337 (1951), this Court held:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." (340).

Despite Greene's assertion that Judiciary Law §479 "cannot . . . be constructed by the courts on a case-by-case basis" (Pet. 25), this Court in *United States v. Raines*, 362 U.S. 17 (1960) stated otherwise.

> ". . . [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." (22).

A picture of mistaken overgeneralization must be drawn from Greene's actions. He testified in the New York State Appellate Division disciplinary proceeding, *Matter of Greene,* 78 A.D.2d 131, 433 N.Y.S.2d 853 (1980), that he mailed the flyers in reliance on *Bates* (Pet. App. D60). Yet *Bates* clearly put attorneys on notice that it was a narrowly-drawn decision.

> "The issue presently before us is a narrow one. . . .
>
> The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain routine services will be performed. 433 U.S. at 366-68. (Emphasis in original.)
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> * * *
>
> In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way." *Id.* at 383.

For petitioner to have concluded after reading *Bates*, and particularly the language quoted above, that he had carte blanche to solicit clients, shows a gross misunderstanding of the intent of this Court.

The first two progeny of *Bates: Ohralik, supra,* and *Primus,* 436 U.S. 412 (1978), are not asserted by Greene as supporting his position, despite the fact that they were decided on May 30, 1978, several months before he mailed the flyers in question. But even when *Ohralik* and *Primus* are considered, they do not support his position.

> "The Rules prohibiting *solicitation* are prophylactic measures whose objective is the prevention of harm before it occurs." *Ohralik* at 464. (Emphasis added.)

The New York statute in question, Judiciary Law §479, also prohibits "solicitation." (Pet. 2).

Nor does a careful reading of *Primus* assist Greene in his claim that he had no notice that what he did was unlawful. *Primus* reiterates that:

> "The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar. . . . Accordingly, nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU." 436 U.S. at 438-39.

Petitioner was on notice that the issue in *Bates* was very narrow. Yet he claims that that narrow decision is so expansive as to, in effect, invalidate the statute in question on the ground that he had no notice of what type of conduct was proscribed. Contrary to his position, it is clear that all solicitation by New York attorneys, "directly or indirectly," is proscribed by Judiciary Law §479 except for that conduct allowed by *Bates* and its progeny.

No one has ever dissented from Mr. Justice Holmes' remark that "the law is full of instances where a man's fate depends on his estimating rightly. . . ." *Nash v. United States*, 229 U.S. 373, 377 (1913). Attorney Alan I. Greene did not estimate "rightly." New York State should not be blamed for his miscalculation.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Dated: White Plains, New York
February 18, 1982

Respectfully submitted,

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